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No. 34

In the Supreme Court of the United States

OCTOBER TERM, 1937

WORCESTER COUNTY TRUST COMPANY, EXECUTOR,
PETITIONER

vs.

RAY L. RILEY, CONTROLLER OF THE STATE OF CALIFORNIA

W. H. H. GENTRY, INHERITANCE TAX ATTORNEY OF THE STATE OF CALIFORNIA

FRANK P. SPROUL, INHERITANCE TAX APPRAISER OF THE STATE OF CALIFORNIA

RESPONDENTS

and

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS

INTERVENOR
(Former Respondent)

MEMORANDUM IN SUPPORT OF MOTION TO SUBSTITUTE HARRY B. RILEY, CONTROLLER OF THE STATE OF CALIFORNIA AS A PARTY RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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The petitioner, executor under the will of Robert H. Hunt, filed in the District Court for the District of Massachusetts a Bill in the Nature of Interpleader, interpleading certain respondents who were the tax officials of Massachusetts and California (R. 1–9),

alleging *inter alia* threatened collection of both Massachusetts and California estate, inheritance and succession taxes, each based upon inconsistent claims of domicile of the testator, Hunt. The respondents Ray L. Riley, W. H. H. Gentry and Frank P. Sproul, the California tax officials, appeared specially and moved to dismiss the Bill (R. 15), alleging that the threatened acts were acts that could be done by them if at all as "public officers or representatives of the State of California" and that they were made respondents "solely in their capacity as public officers and representatives of the State of California in a matter in which the pecuniary interests of that State are involved," and that the court below was without jurisdiction. The District Court denied the motion to dismiss for want of jurisdiction (R. 23) and issued an order of injunction (R. 24).

Further proceedings in the District Court were stayed (R. 25) and the California respondents claimed an appeal from the aforementioned order and decree to the United States Circuit Court of Appeals for the First Circuit (R. 25, 26). On March 15, 1937 the Circuit Court vacated the injunction and remanded the case with directions to dismiss the bill of complaint for want of jurisdiction (R. 59). This mandate was stayed (R. 61). On May 24, 1937 certiorari was granted (R. 61), and Henry F. Long, Commissioner of Corporation and Taxation of Massachusetts, originally a respondent, admitted as a party on his motion to intervene.

The petitioner has now filed a motion to substitute Harry B. Riley, Controller of the State of California as a party respondent, his predecessor in that office, the said Ray L. Riley, having resigned and being no longer in that office. This motion was duly filed with the Clerk of this Court on June 31, 1937, and on July 6, 1937, during the six months' period following Controller Riley's separation from his office, counsel appeared before Mr. Justice Brandeis to submit the motion and show to this Court the substantial need of continuing the cause against Harry B. Riley. Counsel for Harry B. Riley was present to object to the proposed substitution. Mr. Justice Brandeis directed counsel to file with the Clerk of the Court briefs on the motion before the Court's first conference in the Fall.

It is submitted that the Record shows that all the issues that were before the District and the Circuit Courts are before this Court to be reviewed and that these issues are such that the substitution of Harry B. Riley at this stage of the proceedings will not be prejudicial either to him or to the other respondents or parties to the case. The issues raised by the respondents Gentry and Sproul are the only issues that Harry B. Riley can raise. He has no others.

But Harry B. Riley, since January 9, 1937 the Controller of the State of California, opposes the substitution. His position is an interesting one. His predecessor in that office, Ray L. Riley, resigned on that date. Under the California Inheritance Tax Law

the Controller is one of the officials responsible for the administration of that State's inheritance tax system. The respondent Gentry is that State's Inheritance Tax Attorney and the respondent Sproul is that State's Inheritance Tax Appraiser. They are still in office and continue with their claims. The Bill alleges that the several California respondents are acting "each severally or as agent one for another, individually or by their agent or agents." What is the position of Harry B. Riley individually and as Controller? Does he deny the contention of his predecessor in office and that of the other California tax officials, who admittedly are respondents, that their threatened acts were as "public officers" and that they were made respondents solely in their capacity as "public officers." Does he object to being made a party respondent in his individual or in his official capacity? If his associate and agent fellow tax officials are claiming to act only as "public officers," can he claim to act, if at all, only in an individual capacity? Does he deny he will attempt to exercise the power of his office to collect a tax? Is he prepared as a tax official of California to relinquish any claim for taxes from the petitioner as executor based on an alleged residence of the testator Hunt in California and thus alleviate the position of the executor between the conflicting and double inheritance tax claims?

Six months have now passed since the change of personnel in the Controller's office. There has been no

change of position by the California tax officials. Without mention of the resignation of Ray L. Riley, counsel for him and for the respondents, Gentry and Sproul, took steps in the Circuit Court of Appeals for the First Circuit to oppose the restoration of Henry F. Long as a party, and in the Supreme Court of the United States filed a brief opposing the granting of the writ of certiorari (on this Brief the respondent Gentry appeared as associate counsel). Now, the same counsel represents Harry B. Riley, the new Controller, and in his behalf must be held to maintain the right of the California tax officials (including the said Harry B. Riley) to collect the tax imposed by their statute without interference by the Federal Court. Thus it is evident that the successor Controller, Harry B. Riley, has adopted the attitude of predecessor, Ray L. Riley, and approves the action of the other California respondents.

Counsel for the California tax officials may call the court's attention to the recent case of *Ex Parte Laprade*, 289 U. S. 444. In that case no Arizona statute permitted the attempted substitution of the Attorney General of Arizona and, moreover, the successor in office was not alleged to be adopting his predecessor's attitude. The issue presented by the present petition to substitute Harry B. Riley was expressly reserved by the Court in the Laprade case. The opinion states at page 459:

> "We have no occasion to decide whether or in what circumstances a successor in office who adopts the attitude of his predecessor and is proceeding or threatening to proceed to enforce the statute may be substituted in a pending suit. That question is not here and is reserved."

There is every reason to permit the requested substitution. The new Controller has the same interest as his predecessor in claiming the tax and attempting its collection. The substitution should be a mere formality as in the innumerable cases where a new Federal Commissioner of Internal Revenue has been substituted as a party respondent in federal tax suits. See *Welch* v. *Helvering*, 290 U. S. 111 and numerous other cases in that October 1933 term of court. Such suits are against the Commissioner on appeal from the United States Board of Tax Appeals. In them, as in the present case, collection of any tax is in the future. The new incumbent of the office is the real party in interest. The suit is to prevent the collection of the tax by him. Such cases are to be contrasted with the suits against internal revenue collectors for refunds of taxes erroneously collected. In such cases no substitution of a successor collector is proper. There the action complained of is a tax collection in the past. In the instant case the action sought to be prevented is the collection of the tax by the new Controller and the other respondents. If, as seems evident, the statutes cited in the Appendix to the

printed motion permit such substitution of Harry B. Riley as a party respondent, the court should have no hesitation in granting the motion.

If the matter proves to be more than a formality, as apparently is the view of counsel for the California tax officials since he opposes the granting of the motion, the petitioner has no objection to the Court's entry of an order at this time granting to Harry B. Riley the right to argue his contention as to substitution at the same time the case is heard on the merits. One issue on the merits must necessarily be the identity of the respondents, whether as individual tax officials attempting to exercise the power of office as claimed by petitioner, or as the State of California, as maintained by respondents' counsel. It would seem no mistake to consider the matters raised in this motion at the argument of the case on the merits.

Respectfully submitted,

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August, 1937.